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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. WENDY LABUDA, Defendant and Appellant.	C067004 (Super. Ct. No. 10F00604)

The question posed in this appeal is whose contraband is it -- his, hers, or theirs? Undercover narcotics agents found methamphetamine, marijuana, pay/owe sheets, pipes, baggies, packaging materials, and a gun in three different locations. Depending on whose version of the facts the jurors accepted, defendant Wendy Labuda may have possessed the drugs and the various accoutrements found in her bedroom, in a motel room she rented, and/or in her purse, or some of the drugs may have been possessed solely or jointly by her dealer and boyfriend, Keith Zimmerman. The trial court failed to give a unanimity

instruction, creating the distinct possibility the jurors did not agree on who possessed what and where. Because the jury hung on many counts involving possession, we cannot conclude the error was harmless.[1] We reverse.

FACTS

On January 25, 2010, three county sheriff's deputies were surveilling a parolee, 51-year-old Wendy Labuda, outside her apartment. When approached, she gave them a false identification. They arrested her and took her to her apartment. She told them that only her roommate, Andy Babcock, was in the apartment.

When they entered, however, one of the deputies discovered Keith Zimmerman in one of the bedrooms. In that room, the deputy found two baggies with some methamphetamine, a digital scale with residue, and a pay/owe sheet. Zimmerman claimed these items were his. The deputy searched Zimmerman and found $303 in small bills and two motel keys. According to the officers, defendant shouted from the other room that everything belonged to her, not Zimmerman.

A deputy found $349 in cash in defendant's pocket, and searched defendant's purse and found two baggies of methamphetamine, two cell phones, a glass smoking pipe, $900 in

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[1] Since we must reverse the judgment, we need not consider whether the trial court failed to produce a summary of the information it reviewed before denying defendant's *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) or whether it improperly questioned the witnesses.

cash, and a motel room key. A text message on one of the cell phones inquired whether "they were still at the Hawthorn Inn motel." Defendant told the officers she had been staying at the Hawthorn Inn with Zimmerman, but she no longer was staying there with him.

Meanwhile, two officers left to search the motel room. There they found loose methamphetamine on a table near the bathroom, seven separately packaged baggies of methamphetamine, two metal canisters containing methamphetamine, five separately packaged baggies of marijuana, a digital scale, unused packaging baggies, a loaded .38-caliber firearm and additional ammunition, and bills for Babcock's utilities. None of the fingerprints lifted from items found in the motel room matched defendant's.

On the ride to the motel, a deputy recited the *Miranda* advisements to defendant.[2] She stated she understood her rights. She was calm and cordial. She told the officers she rented the room using the same false identification she had shown to them earlier. She insisted the methamphetamine and cash found in her purse and in her bedroom were hers, not Zimmerman's. She admitted to selling a quarter pound of methamphetamine a day to support her own addiction to the drug. She suggested there might be an "eight ball" (3.5 grams) of methamphetamine in the motel room as well as a firearm belonging to someone else.

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

Again, she claimed the methamphetamine was hers; neither Zimmerman nor Babcock was involved.

Defendant told a very different story at trial. She testified that one of the deputies, enraged when he encountered Zimmerman, punched her with a closed fist in the mouth. Everything she did following the assault was based on fear. She told them the drugs and cash were hers, and she waived her rights.

No longer afraid, defendant testified that the methamphetamine, marijuana, and gun in the motel room did not belong to her. The methamphetamine found in her purse was for personal use.

She described a tumultuous and desperate relationship with Zimmerman. She had been addicted to methamphetamine for 16 years and it had destroyed her life, resulting in three felony convictions for possession of the drug for sale. Her addiction led her to Keith Zimmerman, a dealer who, after they started dating, gave her free methamphetamine. She allowed him to stay in her room in an apartment she shared with Babcock, who is physically and mentally disabled. But as a parolee, she remained worried that the foot traffic at the apartment would raise suspicion. She testified she rented the motel room to get Zimmerman out of the apartment and to reduce the risk of detection. She claimed she did not stay at the motel room and never intended to use it.

Defendant admitted she used a half-gram of methamphetamine a day. The 4 grams found in her purse would last her about one week.

The deputy testified he did not strike defendant. A nurse who examined defendant as a part of the booking process testified that defendant did not have any observable injuries, nor did she complain about a punch to the face.

During deliberations the jurors asked 20 questions. Several of the questions involved the meaning of "possession" and "intent." The jurors asked: "Can the defendant be found to have 'possessed' something and simultaneously lack either 'general' or 'specific' intent?" They also asked, "Could the defendant have had 'possession' and not 'intent' with respect to a specific element of a specific count?" They requested a "[r]ead-back of [Detective] Maher's testimony as expert witness to establish what constitutes intent to sell (quantity, baggies, etc.)."

The jurors hung on three counts and all the enhancements. They could not agree on whether defendant was a convicted felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)), possessed methamphetamine while armed (Health & Saf. Code, § 11370.1, subd. (a)) and whether she possessed marijuana for sale (Health & Saf. Code, § 11359). The court declared a mistrial as to those counts. The jury found defendant guilty of possession of methamphetamine for sale (Health & Saf. Code, § 11378) and false impersonation (Pen. Code, § 529, act (3)).

The court found four of the five prior conviction allegations to be true. The court sentenced defendant to a total term of 16 years 8 months in state prison. Defendant appeals.

DISCUSSION

Defendant contends the trial court erred by failing to give a unanimity instruction sua sponte, which would have required the jury to unanimously agree on which act or acts constituted the offense of possession for sale. "[I]n a prosecution for possession of narcotics for sale, where actual or constructive possession is based upon two or more individual units of contraband reasonably distinguishable by a separation in time and/or space and there is evidence as to each unit from which a reasonable jury could find that it was solely possessed by a person or persons other than the defendant, absent an election by the People [a unanimity instruction] must be given to assure jury unanimity." (*People v. King* (1991) 231 Cal.App.3d 493, 501-502 (*King*).) We must determine whether the acts of possession were factually distinct and whether defendant offered separate defenses to each act. (*People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1071 (*Castaneda*).)

The facts are indeed remarkably similar to the facts in *King*. In both cases, the defendants were charged with and convicted of possession of methamphetamine for sale. (*King*, *supra*, 231 Cal.App.3d at p. 495.) In both cases, the methamphetamine was found in three different locations. (*Id.* at p. 499.) In *King*, .76 gram was found stuffed in a ceramic

statue; 2.5 grams and a syringe containing .33 gram of liquid methamphetamine were located in a purse in the living room. (*Id.* at p. 498.) Here, methamphetamine was found in the bedroom, in defendant's purse, and in the motel room. In both cases, the defendants' boyfriends claimed some of the methamphetamine was theirs. (*Ibid.*)

In many ways the evidence against King was even more compelling. Like defendant, she had cash in her pocket. (*King*, *supra*, 231 Cal.App.3d at p. 498.) But several pay/owe sheets were found in her purse and in her pocket. More pay/owe sheets were found in her bedroom and in her living room. Her name and personal information were entered in a notebook described as a pay/owe sheet. (*Ibid.*) By contrast, there were no pay/owe sheets found on defendant's person or in her immediate possession, nor did any of the pay/owe sheets found in the bedroom or the motel room contain any of her personal information.

The court described Ms. King's theory as follows: "The amount of .76 grams was found in a statue. [The defendant's boyfriend] testified the statue and its contents of methamphetamine belonged to him. The amount of .33 grams of liquid methamphetamine was found in Ms. Peebles's purse. The amount of 2.5 grams of methamphetamine was also found in Ms. Peebles's purse. Appellant believes that if some of the jury agreed beyond a reasonable doubt that the .33 grams belonged to appellant, or that the .76 grams belonged to appellant, or that the 2.5 grams belonged to appellant, the jury

arguably could have created a patchwork verdict whereby different jurors believed that the different stashes of methamphetamine belonged to appellant. If this is true, then the jury was not unanimous in its determination that a particular quantity of methamphetamine was in appellant's possession for the purpose of sale." (*King*, *supra*, 231 Cal.App.3d at p. 499.) The court accepted King's theory, concluding that in the absence of the unanimity instruction, the jury may have created a patchwork verdict.

Similarly, Zimmerman was found alone in the bedroom with methamphetamine and a pay/owe sheet. He too admitted that the methamphetamine was his. Defendant testified that she rented the motel room for Zimmerman. The jury may have believed her since it is quite plausible that a parolee would try to distance the foot traffic attendant to drug sales from where she lived. Moreover, none of her fingerprints were found in the motel room; nor were her clothes or personal belongings other than two bills she insisted Zimmerman must have inadvertently removed from the apartment. And she testified that the methamphetamine found in her purse with a pipe was intended for her personal use as a long-standing methamphetamine addict.

Thus, the three acts of possession are factually distinct. Possession of the methamphetamine in one location does not resolve the entirely different factual question whether defendant possessed the methamphetamine in an entirely different place. As suggested by the factual distinction between the acts of possession, defendant's defense to each act differed.

Thirty-one-year-old Zimmerman may have lacked the experience of his fifty-one-year-old mentor, but he too was an active dealer. Defendant testified that she got her methamphetamine from Zimmerman, and after they became romantically involved, he gave it to her for free. Once she became disenchanted with his raucous lifestyle and young friends, however, she explained to the jury that she rented him a motel room to move his business elsewhere. Thus, her defense to the large stash of methamphetamine in the motel room was that it belonged to him. This paralleled her defense to the methamphetamine and paraphernalia found in her bedroom that he alone was in possession. Indeed, Zimmerman himself told the deputy who arrested him that it belonged to him.

Of course, some of the jurors could accept the defense to possession in the motel room and reject it as to her bedroom, or vice versa. Other jurors may have accepted her testimony that she rented the motel room exclusively for Zimmerman to reduce her own risk of rearrest. Or they may have accepted Zimmerman's spontaneous admission that the methamphetamine in the bedroom was his. As the court pointed out in *Castaneda*, the record does not disclose how the jury voted, and most importantly, the record does not demonstrate that the jury unanimously agreed on what act constituted possession for sale. (*Castaneda*, *supra*, 55 Cal.App.4th at p. 1071.)

The record supports a third option as well. Methamphetamine and a pipe were found in defendant's purse. Because of the quantity, the cash, and the cell phones also

located in the purse, the jury could certainly have found that defendant possessed the methamphetamine for sale based solely on the contents found in her purse. On the other hand, some of the jurors may have accepted her defense that the methamphetamine in her purse was solely for personal use, a reasonable conclusion given that she was a heavy user and the amount in her purse would have lasted her only a week. Again, the third factual possibility bolsters the probability that the jurors did not agree on which act constituted the crime.

The Attorney General insists the unanimity instruction was not necessary for two reasons: 1) the prosecutor elected to rely exclusively on defendant's possession of the methamphetamine in the motel room, and 2) no reasonable juror could have convicted defendant of possession of methamphetamine for sale without finding that she possessed it in the motel room. The record belies both arguments.

It is true that a unanimity instruction is unnecessary when the prosecutor elects one among multiple acts and argues to the jury that the designated act should be the basis for conviction. (*People v. Diaz* (1987) 195 Cal.App.3d 1375, 1382-1383.) The Attorney General insists the prosecutor made it clear in her opening statement and closing argument that the possession for sale count was based on the 18.7 grams of methamphetamine found in the motel room. Not so. The Attorney General extracts a few parts of the argument but ignores others.

For example, in her opening statement the prosecutor pointed to the methamphetamine found in defendant's bedroom and

purse as well as the methamphetamine found in the motel room. She told the jury: "You will hear about the evidence that was found in [the apartment bedroom], including two small bags of methamphetamine . . . . [¶] Ms. Labuda had a purse on her when she was contacted by deputies. That purse was searched. She has money in her purse. She has money on her person, over $1,200 in cash. She has more methamphetamine in her purse. You will hear she has a methamphetamine smoking pipe in her purse and two functioning cell phones. Again, the significance of all of these items . . . in relation to the charges will be explained to you by Deputy Maher."

In closing argument, the prosecutor referred to "[a]ll the quantities of methamphetamine that we are talking about in this case, a usable quantity." She specifically relied on all three separate locations when discussing possession and intent.

We agree with defendant that the fact the prosecutor argued the significance of the amount of methamphetamine found in the motel room does not mean she was relying on only that evidence. To the contrary, the prosecutor relied on the evidence found in the bedroom, the purse, and the motel room. On this record, there simply was no election.

Nor do we accept the Attorney General's suggestion that no reasonable juror could have found defendant guilty of possession for sale without finding she was in possession of the methamphetamine in the motel room. In other words, possession of the methamphetamine in either the bedroom or her purse was

not sufficient to support a conviction of possession for sale. Again, the record belies the claim.

First, the jury hung on three counts, all dependent on findings that she possessed items in the motel room. The jurors could not agree if she possessed the marijuana or the firearm necessary to convict her of counts two, three, and four. The marijuana and firearm were located only in the motel room.

Second, the evidence that defendant was staying in the motel room cannot be characterized as "overwhelming." Her fingerprints were not found in the motel room. Nor did she store any clothes or toiletries in the room. She did rent the room using a false identification, but she explained she wanted Zimmerman out of her apartment, where she cared for a man with disabilities. There were two bills in the motel room that defendant paid on behalf of her roommate, but she speculated that Zimmerman might have brought them to the motel room with him. Thus, some of the jurors may have concluded that defendant did not live in the motel room, did not conduct business from the motel room, and did not possess either the gun, the marijuana, or the methamphetamine found there.

Third, some of the jurors could have found that possession of the methamphetamine found either in her purse or in her bedroom was for sale. After all, defendant did live in the apartment, and the methamphetamine was found in her room. Possession of the methamphetamine in either the bedroom or her purse was sufficient to support a finding she intended to sell it. Some jurors may have based conviction on the

methamphetamine found in her purse because she also had two cell phones and $1,200 in cash. Others may have believed the methamphetamine in her purse was for personal use, but the methamphetamine in baggies in her bedroom alongside the pay/owe sheet and packaging materials demonstrated she intended to sell that methamphetamine.

Thus, the record sets forth the kind of evidence of individual units of contraband "reasonably distinguishable by a separation in time and/or space," and "there is evidence as to each unit from which a reasonable jury could find that it was solely possessed by a person or persons other than the defendant." (*King*, *supra*, 231 Cal.App.3d at p. 501.) The court should have, and did not, give a unanimity instruction. Because there is no way of knowing whether all 12 jurors believed defendant constructively possessed the methamphetamine at one, two, or three different locations, the error is not harmless. (*People v. Crawford* (1982) 131 Cal.App.3d 591, 600.)

DISPOSITION

The judgment is reversed.

RAYE, P. J.

We concur:

NICHOLSON, J.

MAURO, J.